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No. 01–419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

In preserving the "safety regulatory authority of a State with respect to motor vehicles," does 49 U.S.C. § 14501(c)(2)(A) allow States to delegate authority to their political subdivisions to enact safety-related tow-truck regulations or does it compel state legislatures to enact all such laws themselves?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-A) is reported at 257 F.3d 506, and the opinion of the district court (Pet. App. 33-A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2001. Pet. App. 1-A. The petition for a writ of certiorari was filed on September 7, 2001. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

As presently codified, the pertinent provisions of 49 U.S.C. § 14501 read as follows:

§ 14501. Federal authority over intrastate transportation.

***

(c) Motor carriers of property. —

(1) General rule. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. — Paragraph (1) —

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial

responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. §§ 14501(c)(1) & (2)(A). The full text of the current version of 49 U.S.C. § 14501 and the history of amendments to it are set forth in an appendix to this brief. *See* Br. App. at A-1—A-4; B-1—B-14.

STATEMENT

A. History Of Towing And Towing Regulation In The United States.

With every step forward in the development of new modes of mechanical transportation, inventors and travelers have had to cope with the inevitability that the innovative machines would break down from time to time. The tugboat, for example, appeared soon after the invention of the steamship, and was created to help "vessels in distress—aground, dismasted, sinking or otherwise damaged." Peter E. Randall, *Tugboats on the Piscataqua* 1 (1992). The "wrecker train" likewise was an inevitable byproduct of the railroad and was designed to put derailed trains back on track. *See United States v. Pa. Co.*, 239 F. 761, 762 (W.D. Pa. 1917).

The development of the tow truck followed a similar pattern. Even before the introduction of the Model T, primitive "tow trucks" were common in American cities and towns. When cars or farm equipment broke down, neighbors frequently would tie a rope to the disabled vehicle, connect it to a working car, then enlist someone to steer and brake the "dead car" while it was being towed. *See Titus v. Tangeman*, 101 N.Y.S. 1000, 1001 (N.Y. App. Div. 1906) (describing the tow of a disabled car with ten feet of rope). Yet unsophisticated rescue operations of this sort, it appears, caused as many problems as they solved, occasionally injuring the driver of the ominously-named dead car or unfortunate pedestrians. *See, e.g., id.* (woman injured while steering towed dead car); *Beaucage v. Mercer*, 92 N.E. 774, 775-76

(Mass. 1910) (same); *Musgrave v. Studebaker Bros. Co. of Utah*, 160 P. 117, 118-19 (Utah 1916) (pedestrian tripped by towing rope); *Silverstein v. Schneider*, 164 A. 480, 481 (N.J. 1933) (pedestrian injured when tow rope broke and disabled car struck him). *See also Glasgow v. Dorn*, 220 S.W. 509, 510 (Mo. Ct. App. 1920); *Wilkowsky v. Grant Iron & Metal Co.*, 189 N.W. 10, 10-11 (Mich. 1922); *Tower v. Camp*, 130 A. 86, 86-87 (Conn. 1925).

Recognizing the perils of these early towing techniques, governments soon began regulating them. By the 1930s, towing operators in Detroit were required to use side safety chains, were required to limit the length of cables used to attach disabled vehicles and were barred from towing more than one vehicle at a time. *See Fraley v. J. Calvert's Sons*, 254 N.W. 167, 168 (Mich. 1934). At roughly the same time, Akron passed a similar regulation governing these and other towing requirements. *See Burns Motor Co. v. Briggs*, 160 N.E. 728, 729 (Ohio Ct. App. 1928).

During the late 1930s and 1940s, the development of the Ernest Holmes tow truck addressed many of these early problems. Equipped with stabilizing jacks, Manley cranes, strong cables and the classic "V" towbar, these tow trucks eventually became widespread and solved many of the equipment-related safety problems associated with the early tow truck. *See* Ron Kowalke, *Old Car Wrecks and the Vehicles at Accident Scenes, 1920s to 1960s* 24-27 (1997); Don Wood, *Half-Hour History of Tow Trucks*, 160 Special Interest Autos 54, 55 (July/Aug. 1997).

Even after the development of the commercially-produced tow truck, it did not take long for new safety problems to emerge. As American cities grew, so did traffic congestion within them, which led to more urban accidents caused by tow trucks that obstructed busy roads during the hook up or that moved more slowly than surrounding traffic and were not perceived by oncoming cars. *See Body, Fender & Brake*

Corp. v. Matter, 172 Va. 26, 28-29 (Va. 1939) (car crashes into tow truck attaching a disabled vehicle); *Gulf Brewing Co. v. Goodwin*, 135 S.W.2d 812, 815 (Tex. Civ. App. 1939) (vehicle strikes dead car that lacked a back light); *Engle v. Nelson*, 263 N.W. 505, 507 (Iowa 1935) (same); *Frame v. Arrow Towing Serv.*, 64 P.2d 1312, 1315 (Or. 1937) (cars crash while attempting to pass tow truck attaching a vehicle); *Fraley*, 254 N.W. at 164-68 (accident caused when car attempted to pass slow-moving tow truck).

These new safety issues of the 1930s and 1940s generated a new round of regulations. Chicago, for example, began regulating the speed of tow trucks and the back lighting of towed cars. *See Williams v. Consumers' Co.*, 185 N.E. 217, 219-220 (Ill. 1933). New York City banned tow trucks on the Hudson River Parkway except to move a disabled car to the next exit. *See People v. Mann*, 48 N.E.2d 274, 275 (N.Y. 1943). And to prevent towing-related "traffic congestion and the dangers incident thereto," Chattanooga enacted licensing and registration requirements for tow operators—a measure that has since been adopted by numerous cities and remains prevalent today. *See City of Chattanooga v. Fanburg*, 265 S.W.2d 15, 19 (Tenn. 1954).

Nor were cities alone in passing tow-safety laws. Some States in the middle of the last century did the same. *See, e.g., Frame*, 64 P.2d at 1315-16 (quoting Oregon law requiring tow-truck operators to "place at a suitable distance in each direction upon such roadway suitable signs or signals warning the drivers of oncoming vehicles of such operations"); *Anderson v. Robbins Incubator Co.*, 8 N.W.2d 446, 449 (Neb. 1943) (quoting Nebraska law requiring tow trucks to "be equipped with at least three portable flares which may be plainly visible for a distance of five hundred feet").

As tow trucks became an everyday part of the urban landscape, competition for the business grew, leading to new regulatory issues. Pursuing new business with a zeal that

would make even Ayn Rand blush, some tow operators began racing recklessly to accident scenes in the enterprising hope of securing new clients. Known then (and now) as "chasing," this sharp-elbowed practice became so widespread in the middle of the twentieth century that numerous cities enacted ordinances to combat it. Dallas for instance passed an ordinance prohibiting tow-truck operators from following police cars and ambulances to an accident or from soliciting business at the accident scene. *See City of Dallas v. Harris*, 157 S.W.2d 710, 710 (Tex. Civ. App. 1941). And one New Jersey city addressed the problem by requiring tow-truck operators to be of good moral character, denying towing licenses to individuals with criminal records. *See Librizzi v. Plunkett*, 16 A.2d 280, 281 (N.J. 1940).

By the 1950s, chasing was such a common practice that the Tennessee Supreme Court took judicial notice of it. "[M]ost cities the size of Chattanooga," the Court noted, "have police or shortwave radios over which reports are made and that wrecker operators and others have receiving sets or something of the kind in their cars where they obtain information about these wrecks and immediately rush to the scene of the accident which of course in many instances might create a hazard on the public streets." *See Fanburg*, 265 S.W.2d at 20. The then-leading treatise on municipal law devoted an entire section to the authority of cities to address this practice. *See* 7 *McQuillin on The Law of Municipal Corporations* § 24.628 (3d ed. 1949).

Despite decades of local efforts to regulate chasing and the safety risks that come with it, American cities still confront problems in this area. Over thirty years after it upheld the Dallas anti-chasing law, a Texas court revisited the issue in the context of a similar San Antonio ordinance:

> The not unusual situation was for several wreckers to appear at the scene of an accident, creating problems for officers who were attempting to restore the normal flow of

> traffic and seriously interfering with the efforts of police officers to investigate the accident and file the required reports. Wreckers were equipped with radios capable of monitoring the police frequencies. When the wreckers arrived on the scene of the accident they would engage in fiercely competitive efforts to induce the car owners to engage their services. The result was disorder and confusion at the scene of the accident.

Andrada v. City of San Antonio, 555 S.W.2d 488, 490 (Tex. Civ. App. 1977). Just a few months ago, the Fifth Circuit confirmed that chasing remains an essential police-power issue for cities in the twenty-first century. *See Stucky v. City of San Antonio*, 260 F.3d 424, 427 (5th Cir.), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028); *see also Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 769 (2d Cir. 1999).

Nor are these the only safety problems that have required American cities to regulate local towing operations. To reduce their costs, towing companies increasingly demand cash-only payments from vehicle owners, store cars in desolate and unsafe parking facilities, and limit their hours of operation. The dangers associated with vehicle retrieval, a California court recently observed, were demonstrated by one individual

> who described his plight—and his concern for his safety—that ensued upon his return to a private parking lot one Saturday evening to find his car missing and no one in the parking lot . . . . [After determining that his car was not stolen,] Griffith took [a] taxi to the "tow yard" and, concerned about its location, asked the taxi driver to wait with him while he retrieved his car. Griffith went to the gate, and the person there said he could not let him in and that he had to wait. After some 20 minutes, Griffith "ran out of money" [and the taxi left] . . . . Griffith waited [alone outside] for another 45 minutes to an hour until [the tow

> operator] arrived. Griffith got out his credit card, to be expressly told that his credit card "won't be accepted."

People ex rel. Renne v. Servantes, 103 Cal. Rptr. 2d 870, 878 (Cal. Ct. App.), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). To remedy these safety problems, cities have passed ordinances requiring towing companies (1) to accept credit cards, cash or checks for the release of towed vehicles, (2) to stay open for extended hours, and (3) to notify the police after towing a vehicle from private property. *See, e.g., id.* at 874 (San Francisco ordinances); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1043 (9th Cir. 2000) (Santa Ana ordinances), *cert. denied*, 531 U.S. 1146 (2001).

Since its "invention" nearly one hundred years ago, automobile towing has caused numerous, varied and persistent safety problems. And since that time, cities understandably have sought to regulate this area by exercising the local police powers delegated to them by their respective state governments. Today, this legacy of safety regulation remains: *Every* major city in America has enacted ordinances addressing towing safety, from basic requirements governing the equipment used for towing and the qualifications of tow operators to regulations governing the manner in which tows and vehicle retrieval must be conducted. *See* Br. App. at D-1—D-2.

B. History Of Columbus Towing Regulations.

Columbus, Ohio, is no stranger to towing regulations of this sort. In 1972, the city first enacted tow-truck safety ordinances, which regulated tow equipment and required tow trucks to undergo annual safety inspections. *See* City of Columbus Wrecker Rules and Regulation, Pet. App. 48-A, and Wrecker Inspection Sheet (enumerating items to be inspected), Pet. App. 54-A. And like numerous other cities, it mandated that tow operators obtain a license, maintain liability insurance, and keep records of each vehicle towed. *See*

Columbus, Ohio, City Code §§ 549.02, 549.14, 549.15, 549.16, 549.17, and 549.18, Pet. App. 37-A—38-A, 44-A—47-A. Each of these requirements applies to tow-truck operators only when they pick up vehicles within the City of Columbus. *See id.* § 549.02 ("This section shall not apply . . . when the property being towed has been picked up outside of the City."), Pet. App. 37-A—38-A.

In 1975, Columbus added an anti-chasing provision to its regulations. Under this section, tow operators may not go to an accident site unless "summoned by a person having a direct interest in the vehicle . . . or dispatched thereto as provided in the rules and regulations promulgated by the [City] Safety Director." *Id.* § 549.065, Pet. App. 40-A.

Columbus, like all cities that have regulated this area, enacted these ordinances in accordance with authority delegated to it by the State. The Ohio Constitution grants municipalities within the State the general authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws." Ohio Const. art. XVIII, § 3. In addition, the Ohio legislature has enacted statutes that empower cities to regulate motor vehicles and highways. The Ohio Revised Code § 715.22, for example, provides that a municipality may regulate the use of vehicles and the transportation of articles upon its highways. And § 723.01 states that "municipal corporations shall have special power to regulate the use of the streets." Ohio likewise has exempted tow trucks from the State's regulation of motor carriers, *see* Ohio Rev. Code Ann. §§ 4921.02(A)(8) and 4923.02(A)(10), and leaves local tow-truck regulation largely to the cities. *See City of Cincinnati v. Reed*, 500 N.E.2d 333, 339 (Ohio Ct. App. 1985) (municipal towing regulations authorized by state law).

C. History Of Relevant Federal Statutes And Regulations.

1. History Of Interstate Regulation.

From the early days of the automobile until 1925, motor carriers were regulated (if at all) by state and local governments. In that year, however, the Supreme Court decided *Buck v. Kuykendall*, 267 U.S. 307, which permitted state and local governments to regulate only *intrastate* transportation, with one important exception. States and cities were permitted to continue regulating interstate *and* intrastate transportation "with a view to safety or to conservation of the highways [e.g., routing restrictions based on size and weight]." *Id.* at 315. The effect of *Buck v. Kuykendall* was to permit state and local governments to regulate the safety of motor carriers entirely but to allow them to enact economic regulations with respect only to intrastate traffic.

The conspicuous gap in the economic regulation of *interstate* transportation left by this decision was filled by the Federal Government in the mid-1930s, when it first began regulating motor carriers. Under the Motor Carrier Act of 1935, Pub. No. 255, 49 Stat. 543, the Federal Government empowered the Interstate Commerce Commission ("ICC") to regulate motor carriers engaged in interstate commerce. The Act preserved the States' exclusive regulatory authority—both economic and safety—over *intrastate* commerce by motor carriers. And although the Act allowed the ICC to establish *interstate* safety requirements (the first federal motor carrier safety regulations were promulgated in the late 1930s), the ICC relied heavily on state and local governments to regulate this area of safety as well. *See, e.g., Sharp v. Barnhart*, 117 F.2d 604, 607 (7th Cir. 1941) (federal regulation of interstate motor carriers "has not yet been extended to cover ordinary traffic safety regulations"). Absent a conflicting federal safety regulation on the same subject, state and local governments retained their safety regulatory authority over interstate motor

carriers, *see H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84-85 (1939) (emphasizing the importance of "local supervision of operation of motor vehicles"), as well as regulatory authority over the "size and weight of motor vehicles" on their highways. *See Maurer v. Hamilton*, 309 U.S. 598, 616 (1940).

Three years later, Congress in 1938 extended its economic regulation of interstate transportation to the aviation industry, creating the Civil Aeronautics Board to establish reasonable air-carrier rates. *See* Civil Aeronautics Act of 1938, Pub. No. 706, 52 Stat. 973. Unlike motor carriers, however, air carriers were not subject to state and local safety regulations. Rather, air transportation, whether intrastate or transoceanic, fell under the Federal Aviation Administration's safety regulatory authority. *See* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

Beginning in the late 1970s, Congress reversed course and began to eliminate federal economic regulations in the field of interstate transportation. In 1978, it passed the Airline Deregulation Act, which dismantled the Civil Aeronautics Board and its price-control measures. In order to prevent States from "undoing" this deregulation through their authority to set prices for *intrastate* air travel, Congress preempted States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. The regulation of all airline safety, however, remained under the jurisdiction of the FAA.

In 1980, with the passage of the Motor Carrier Act, Congress extended this deregulatory trend to the motor carrier industry. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. This Act eased federal economic restrictions on interstate trucking companies and eliminated anti-competitive route restrictions. A few years later, Congress enacted the

Motor Carrier Safety Act of 1984. The goal of this Act was to improve the safety of *interstate* trucks and buses and to increase compliance with traffic and safety laws. *See* Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, 98 Stat. 2832. Under the Act, state and local governments were allowed to continue regulating motor carrier safety with respect to *interstate* transportation, but these laws were subject to review by the Department of Transportation ("DOT"). *See* 49 U.S.C. §§ 31136, 31141 (authorizing the Secretary to establish regulations governing state and local laws with respect to interstate commercial motor vehicle safety); *see also* 49 C.F.R. § 355 (implementing these provisions).

2. History Of Intrastate Regulation.

In 1982, Congress sought for the first time to regulate the safety of commercial motor vehicles involved in *intrastate* activities by enacting the Motor Carrier Safety Assistance Program ("MCSAP"), a federal grant-in-aid program. *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097. As the program exists today, it allows DOT to review state and local safety laws applicable to intrastate motor carriers in every participating State to determine whether these laws are compatible with federal standards. *See* 49 U.S.C. § 31104(h); 49 C.F.R. § 350.335. Again, however, Congress left in place the authority of state and local governments to enact safety laws.

In 1994, Congress deregulated local price controls for intrastate motor carriers by enacting the Federal Aviation Administration Authorization Act ("FAAA Act"), Pub. L. No. 103-305, 108 Stat. 1569 (1994). This Act, which is at issue in today's case, regulated intrastate motor carrier services (such as towing or moving within a State) and the intrastate services of motor carriers associated with airlines (such as United Parcel Service). *See id.* § 601(a); H.R. Conf. Rep. No. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755. Borrowing from predecessor legislation that deregulated price

control of air transportation, Congress preempted all state and local laws relating to "a price, route, or service" of any motor carrier and of any motor carrier affiliated with a direct air carrier. *See* H.R. Conf. Rep. No. 103-677, at 83. The point of this preemption was twofold: first, to put motor carrier companies that did not qualify as "air carriers" under the earlier Airline Deregulation Act (such as United Parcel Service), and thus were still subject to state regulation, on a level playing field with those that did qualify as air carriers (such as Federal Express); and second, to extend that same treatment to smaller, intrastate motor carriers by freeing them from local price controls and barriers to entry. *See id.* at 85-87. Consistent with its longstanding tradition of allowing state and local governments to regulate both interstate and intrastate motor vehicle safety, however, Congress excepted from preemption the "safety regulatory authority of a State." 49 U.S.C. § 14501(c)(2)(A).

D. History Of The Case.

Ours Garage and Wrecker Service, Inc. operates a towing company that provides services in Columbus, Ohio. In September 1998, its Columbus towing license expired, and the company failed to renew its license. Shortly thereafter, the city cited one of the company's drivers for failing to have a towing license. Pet. App. 37-A.

Rather than renew its license at that time, the company attempted to invalidate the underlying ordinance. On December 3, 1998, it sued the City of Columbus and two city officials in the United States District Court for the Southern District of Ohio, seeking a declaration that Columbus lacked authority to regulate these local safety issues. The Towing and Recovery Association of Ohio, a trade association of tow-truck operators, joined the suit and became a co-plaintiff. In their complaint, the two claimants alleged that 49 U.S.C. § 14501(c)(1) prohibits the City from regulating a wide variety of local towing operations. The City of Columbus responded

that, while this provision preempts state and local regulations "related to price, route or service of any motor carrier . . . with respect to the transportation of property," it is subject to several exceptions. And one of those exceptions, the City argued, applies here because it expressly preserves "the safety regulatory authority of a State with respect to motor vehicles."

The district court disagreed. On March 10, 2000, it granted summary judgment in favor of the plaintiffs, found Columbus's towing ordinances preempted, and enjoined the City from continuing to enforce its regulations in this area. *See* Pet. App. 34-A.

On June 19, 2001, the Sixth Circuit affirmed. *See Our Garage & Wrecker Serv. v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), Pet. App. 1-A—2-A. Relying on its prior decision in *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001), the court held that § 14501(c)(1) preempts all local towing regulations. Pet. App. 2-A. In *Petrey*, the court had concluded that a similar Toledo ordinance was not a *state* law and therefore was not a permissible safety regulation. *Petrey* noted that Congress specifically mentioned "political subdivisions" several times in § 14501, including in the preemption provision relevant here. Its failure to name "political subdivisions" in § 14501(c)(2)(A), *Petrey* concluded, signaled an intent to prohibit cities, as opposed to States, from enacting safety laws. *See* Pet. App. 23-A—24-A.

SUMMARY OF ARGUMENT

I.A. In preserving the "safety regulatory authority of a State" with respect to the intrastate regulation of motor carriers, Congress not only chose to remove safety regulations from the preemptive reach of § 14501(c)(1) but also preserved the traditional power of States to choose how, when and where that safety authority was exercised—whether through laws enacted by state legislatures, regulations promulgated by executive-branch state agencies, ordinances passed by local governments, or by some combination of the above. As

dictionary definitions and case law confirm, "regulatory authority" has a settled meaning denoting the power of an entity to act directly or to empower others to act on its behalf.

B. Any doubt about the meaning of the phrase is removed by the legal and historical background against which Congress enacted it. When the safety exception was passed in 1994, the discretion of States to delegate their police powers to local governments was as well known as it was widespread. And just three years before its enactment, this Court held that a reservation of authority to "State[s]" means that Congress left "the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation . . . in the hands of local authorities." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). That interpretation has particular relevance here given (1) the longstanding and prevalent regulation of towing operations by cities that preceded the passage of this law, and (2) the longstanding federal preservation of state and local authority over highway safety and route restrictions.

II.A. In reaching a contrary conclusion, the lower court first relied on *Russello v. United States*, 464 U.S. 16 (1983), which says that Congress's inclusion of a term in one part of a statute and its exclusion in another may be interpreted as deliberate. But this negative inference is designed to eliminate ambiguity, not to create it, and the absence of any uncertainty over the meaning of "safety regulatory authority of a State" makes the principle inapplicable here. The provisions of § 14501 that regulate "political subdivisions" by name, moreover, are sufficiently different from § 14501(c)(2)(A) in structure, syntax and function that *Russello*'s negative inference from the preservation of "the safety regulatory authority of a State" cannot be drawn. In all events, *Russello* establishes at best a contextual clue, but one the Court has never embraced when the resulting interpretation multiplies rather than diminishes the interpretive problems presented by a statute. Unless the safety exception is read to permit local regulation and

enforcement, no local authority, not even city police officers, would be authorized to *enforce* state safety laws against tow-truck operators. Similarly, the lower court's interpretation would render countless local size, weight and hazardous-materials route restrictions invalid and would render countless state laws in this area effectively unenforceable.

B. The Sixth Circuit's reliance on the legislative history and deregulatory function of the statute does not shore up these deficiencies. The court's single citation to the legislative history demonstrates only that Congress meant to eliminate price controls and barriers to entry in the intrastate motor carrier industry. This undisputed point, however, says nothing about the role of local safety regulations in Congress's statutory scheme, and indeed not one member of Congress during the 1994 debates over this exception said that the preemption provision would bar States from exercising their traditional prerogative of delegating safety authority to cities, counties and executive-branch agencies. And because the court of appeals' reading of the statute bars *aggregations* of States from enacting uniform safety laws, its interpretation hardly squares with the purported deregulatory objective of eliminating "another level of regulation." Pet. App. 28-A.

III. Nor should one lose sight of the end product of the decision below—namely, the interpretation of a federal law to bar state legislatures from distributing power to political subdivisions however they see fit, and to do so in an area of "intrastate" federal legislation no less. Whether in the context of federal laws that purport to establish qualifications for high-ranking state officials, that purport to expose state fiscs to money-damages actions or that purport to regulate other core state functions, the Court has not lightly imputed to Congress an intent to invade the traditional prerogatives of state government but has required such a policy to be expressly stated. Even the most modest respect for Federal-State comity, to say nothing of steering clear of unconstitutional constructions of federal laws, demands a rigorous presumption

against the interpretation of § 14501(c)(2)(A) embraced by the lower court. Whatever else may be said about the provision, it assuredly does not expressly prohibit state delegations of authority.

ARGUMENT

I. SECTION 14501(c)(2)(A) PERMITS STATE LEGISLATURES TO REGULATE TOWING SAFETY DIRECTLY OR TO DELEGATE IT TO OTHER POLITICAL SUBDIVISIONS.

A. The "Safety Regulatory Authority Of A State" Includes Local Safety Regulations Promulgated In Accordance With State Delegations Of Power.

The court of appeals' interpretation, as a preliminary matter, alters the customary meaning of the "safety regulatory authority of a State." By every conventional measure, the phrase includes the power of a state legislature to pass safety laws as well as the power of a state legislature to delegate law-making and law-enforcing power to state agencies, to state political subdivisions or to multi-state commissions.

First, dictionary definitions and common usage confirm this reading. "Regulatory" authority is authority that "relate[s] to regulation," *see Webster's Third New Int'l Dictionary* 1913 (1968) (defining "regulatory"), and "regulation" encompasses action "by an administrative agency or a local government . . . . agency regulation; subordinate legislation; delegated legislation." *Black's Law Dictionary* 1289 (7th ed. 1999) (defining "regulation"); *see also American Heritage Dictionary of the English Language* 1471 (4th ed. 2000) (defining "regulate" as "to control or *direct* by a rule, principle or method") (emphasis added). In preserving the "regulatory" power of the States over motor vehicle safety, Congress by definition preserved the States' power to delegate authority to other state-created entities and officials.

Second, before Congress enacted the safety exception in 1994, numerous judicial decisions reflected this usage of the phrase. Case after case uses "regulatory authority" to mean both a State's own legal authority to create laws *and* its power to delegate that authority to other political subdivisions or branches of government. *See Traweek v. City of San Francisco*, 920 F.2d 589, 593 (9th Cir. 1990); *Sproul v. City of Wooster*, 840 F.2d 1267, 1269 (6th Cir. 1988); *Wilson v. City of Seattle*, 863 P.2d 1336, 1337 (Wash. 1993); *Vonderhaar v. Parish of St. Tammany*, 633 So. 2d 217, 221 (La. Ct. App. 1993); *Bd. of County Comm'r v. Bowen/Edwards Assoc.*, 830 P.2d 1045, 1055 (Colo. 1992) (en banc); *Neb. Natural Gas Co. v. City of Lexington*, 93 N.W.2d 179, 180-81 (Neb. 1958); *Tsutras Automatic Phonograph Co. v. City of Williamson*, 51 S.E.2d 427, 429 (W.Va. 1949); *Del Balso Holding Corp. v. McKenzie*, 271 N.Y. 313, 316 (N.Y. 1936).

This Court has followed a similar path in using the phrase. It has often said that a State asserts "*regulatory authority* by enacting laws *and* . . . empower[ing] [subdivisions] to investigate and to establish rules to this end." *Sterling v. Constantin*, 287 U.S. 378, 397 (1932) (emphasis added); *see also Scripps-Howard Radio v. FCC*, 316 U.S. 4, 12 (1942) ("[F]ederal regulatory authority" used to mean Federal Government's power to delegate authority to an agency). And it has specifically recognized that the "regulatory authority" of the States includes the States' power to enact laws and their authority to "delegate this power as they see fit," including to cities. *City of Newport v. Iacobucci*, 479 U.S. 92, 96 (1986).

B. *Mortier* Confirms This Settled Understanding.

Three years before Congress enacted this 1994 legislation, the Court removed any doubt regarding this understanding in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 598 (1991). At issue was the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, which

regulated pesticide use, sales and labeling and which expressly preserved the power of a "State" to "regulate the sale or use of any federally registered pesticide or device . . . to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v (1988). In construing this preservation of state power, the Supreme Court of Wisconsin (like the court of appeals here) held that FIFRA preempted *local* regulation of pesticides because the statute allowed only the *State* to enact pesticide-related laws.

This Court reversed. In doing so, it invoked the "well settled" principle "that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in [its] absolute discretion." *Mortier*, 501 U.S. at 607-08 (internal citations and quotation omitted). It then reasoned that States so regularly act through their local governments that "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers." *Id.* at 608. FIFRA's grant of "regulatory authority to the States," the Court thus concluded, meant that Congress left "the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.* at 607-08.

In view of *Mortier* and the time-honored assumptions upon which it rests, Congress no doubt meant "regulatory authority of a State" to permit state legislatures to enact appropriate laws on the topic or to delegate to other state-created entities the power to do so. For where "Congress thus employ[s] terminology that evokes a tradition of meaning, . . . [i]t may be assumed, in the absence of indications to the contrary, that Congress intended this language to be read in light of that tradition." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978).

C. For More Than Two Centuries, The Delegation Of State Police Powers To Local Governments Has Been A Fixed Part Of The American Legal Landscape.

Not just *Mortier*, but two hundred years of history, confirm the clarity with which Congress spoke in preserving the "safety regulatory authority" of the States. State delegations of power, like Federal delegations of power, have a distinguished and indispensable pedigree in American government, and the Court has never lightly assumed that Congress would casually alter such an "accumulated legal tradition and meaning of centuries of practice." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Well before the passage of the safety exception in 1994, this Court had recognized the essential role that cities play in exercising the reserved powers of the States. They represent not only "convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them," *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), but also "a portion of its governmental power," *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 549 (1905). *See Bd. of Comm'rs of Tippecanoe Co. v. Lucas*, 93 U.S. 108, 114 (1876); *United States v. Baltimore & Ohio R.R. Co.*, 84 U.S. 322, 329 (1872) (cities are "representative not only of the State, but . . . a portion of its governmental power"); *Maryland v. Baltimore & Ohio R.R. Co.*, 44 U.S. 534, 550 (1845) (cities are "nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides."). Recognizing the advantages of dividing power into more convenient units of political authority, every State in the Union has delegated general police powers to cities in one way or another. *See* Br. App. at C-1—C-2.

This working assumption of American government has special application here because the regulation of motor vehicle safety has often been recognized as peculiarly suited for local control—particularly in States with large cities. *See* Chester J. Antieau & William J. Rich, 3 *Modern Constitutional Law* § 43.28 (2d ed. 1997); Charles J. Babbitt, *The Law Applied to Motor Vehicles* § 30 (4th ed. 1933); Xenophon P. Huddy, *Encyclopedia of Automobile Laws* § 68 (9th ed. 1932). "[L]ocalities," after all, "know the structure of their roads and regional traffic problems better than any national agency." Antieau & Rich, *supra*, at 62; *see also* cases discussed therein. And, indeed, "[f]ew subjects of state regulation are so peculiarly of local concern as is the use of [the] highways . . . . [W]here traffic control and the use of highways are involved . . . great leeway is allowed local authorities." *Ry. Exp. Agency v. New York*, 336 U.S. 106, 111 (1949). Nor has this tradition eluded the regulation of intrastate towing operations. Every major city in the country has historically exercised, and continues to exercise, its delegated power to police local towing operations. *See supra* pp. 2-7; Br. App. at D-1—D-2.

This background informs and confirms the straightforward meaning of § 14501(c)(2)(A). When combined with *Mortier*'s teaching that an "express grant of regulatory authority to the States . . . . [means that] localities would still be free to regulate," 501 U.S. at 607, this history makes clear that Congress's preservation of the "safety regulatory authority of a State" encompasses a state legislature's power to delegate.

II. THE COURT OF APPEALS' CONTRARY ANALYSIS IS WRONG.

A. The Lower Court's Reliance On Congress's Specific Mention Of "Political Subdivisions" In Other Subsections Of § 14501 Was Misplaced.

Instead of starting its analysis by considering the clear, textual and historical meaning of "safety regulatory authority of a State," the court of appeals began by looking at its meaning in the context of other provisions of § 14501. In the court's view, the contrast between the specific mention of "political subdivision[s]" in subsection (c)(1) and its absence in subsection (c)(2)(A) could only be given content by reading the exception as applying solely to "State"-enacted safety regulations. *Petrey v. City of Toledo*, 246 F.3d 548, 561 (6th Cir. 2001). Relying on *Russello v. United States*, 464 U.S. 16 (1983), the court thus concluded: "Where 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Petrey*, 246 F.3d at 561 (quoting *Russello*, 464 U.S. at 23). That principle of interpretation, however, does not support the lower court's analysis in this instance.

1. The *Russello* Principle Is Designed To Eliminate Ambiguity, Not To Create It.

The court of appeals initially erred by promoting *Russello* to an interpretive aid of first resort. Neither *Russello* nor any other precedent from this Court says that the inference applies in spite of, rather than because of, the existence of threshold ambiguity in a statute. As shown above, however, no such ambiguity exists. In the absence of any indication that the safety exception's coverage is uncertain in its terms, the lower court had no license to invoke the ambiguity-removing implications and inferences that *Russello* allows.

Put another way, the *Russello* principle serves to eliminate confusion, not to establish it in the first instance. Because the phrase at issue—"safety regulatory authority of a State"—has an accepted, plain, and unambiguous meaning, it was unnecessary to rely on any rule of construction (other than plain meaning) in this case. To do otherwise impermissibly raises "the negative pregnant" created by silence in one section of a statute (but not another) "to the level of interpretive trump card." *Field v. Mans*, 516 U.S. 59, 67 (1995). That violates a "cardinal" rule of interpretation. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal quotations and citations omitted). This error by itself requires reversal.

2. In 1994, Congress Had Legitimate Reasons For Mentioning Specific Political Bodies By Name In Some Sections Of § 14501 But Not In Others.

Even aside from the lower court's improper elevation of *Russello* to a primary (rather than a secondary) principle of statutory construction, the principle fails to advance respondent's argument on its own terms. Congress had ample reasons for mentioning "political subdivisions" by name in some parts of § 14501 and referring to the "regulatory authority of a State" in other sections of the statute. Accordingly, the contextual inferences at the core of this argument do not alter the chief inference in every statutory-interpretation case—that Congress meant what it said in preserving the "safety regulatory authority of a State." *See Germain*, 503 U.S. at 253-54; *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 & n.10 (1995) (declining to apply *Russello* where there were alternative explanations for congressional silence).

a. The Differences Between § 14501(c)(1) And § 14501(c)(2)(A) Have Several Legitimate Explanations.

As an initial matter, the distinctions between the wording of the preemption provision and the safety exception do not support the lower court's analysis. The preemption provision, it is true, refers to "a State, political subdivision of a State, or political authority of 2 or more States." 49 U.S.C. § 14501(c)(1). And the safety exception, it is true, refers to "the safety regulatory authority of a State." *Id.* at § 14501(c)(2)(A). But in focusing on the different references to political bodies in the two subsections, the court slighted other more illuminating distinctions between them and in the end overlooked legitimate explanations for wording the provisions differently.

For one, the structure of the pertinent sentences is not parallel and accordingly precludes the inference that state legislatures alone may enact safety regulations. To make the *Russello* inference applicable, the preemption provision would need to apply to "the regulatory authority of a State, the regulatory authority of a political subdivision of State, or the regulatory authority of 2 or more States." In the absence of that predicate similarity in sentence structure, however, no reason exists for ignoring the customary meaning of "regulatory authority of a State" in the safety exception. *See Mortier*, 501 U.S. at 608-09 (refusing to interpret the word "State" to preclude delegations to political subdivisions merely because related provisions specified the role of "States" and "political subdivisions").

For another, when Congress drew these distinctions in 1994, it made sense to specify what States, political subdivisions and combinations of States *could not do*, while leaving it to the "safety regulatory authority of a State" to decide what they *could do* when it comes to safety regulations. In specifying the political entities preempted from enacting

and enforcing certain laws, rather than simply proscribing the "State" from doing so, Congress wisely clarified in belt-and-suspender terms the breadth of preemption. But in identifying areas not covered by the preemption provision, it respectfully left it to the States to decide for themselves what aggregations or divisions of state political authority they would allow to regulate the area. That made particular sense here in view of Congress's tradition since 1935 of generally preserving state and local authority over motor vehicle safety and its more recent practice of delegating to DOT the power to review state and local safety regulations to ensure that they do not unduly interfere with interstate commerce or other federal policies. *See supra* pp. 8-12; 49 U.S.C. §§ 31104(h), 31136, 31141; 49 C.F.R. §§ 350.335, 355.

Nor is it unusual to enumerate the political entities that are preempted from enacting a certain law, then to vest regulatory authority in each State to decide which subsidiary political bodies may benefit from an exemption to the rule. It will often be the case that a general ban enumerates those covered by it, while delegating to another authority the power to establish and implement exceptions to the ban. For example, the Secretary of the Army may enact a general rule banning all on-duty card playing by general, lieutenants, captains and other members of the armed services. But the Secretary does not undercut that rule by empowering generals to decide what is "off duty" or to delegate that decision to others. As every soldier knows and as every lawyer eventually learns, allocations of power in a hierarchical system are not necessarily symmetric.

b. The Other Provisions Of § 14501 That Mention "Political Subdivisions" Do Not Alter This Analysis.

In reaching its conclusion, the court of appeals also relied on three other provisions of § 14501 that mention "political subdivisions" by name. That, too, was incorrect.

Two of these provisions—§ 14501(c)(2)(C) and § 14501(a)(1)—were not even enacted in 1994. Congress enacted the first of these provisions in 1995 and the second of them in 1998. *See* Br. App. at B-10—B-14. As the Court has instructed, "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilve v. United States*, 519 U.S. 79, 89 (1996). The lower court did not heed this requirement here.

That leaves the third provision—§ 14501(c)(3). To be sure, it was enacted as part of the 1994 legislation, and it specifies that the preemption provision does not affect "any authority . . . of a political subdivision of a State" to enact regulations regarding traditional state commercial-transportation rules, such as uniform cargo-liability and bill-of-lading rules. 49 U.S.C. § 14501(c)(3)(A). But a full reading of the subsection indicates that it was designed to give power to motor carriers, not to States or cities. All of the commercial transportation rules preserved by this provision, it turns out, "only appl[y] to a [motor] carrier upon request of such carrier." 49 U.S.C. § 14501(c)(3)(B)(ii). Under these circumstances, it made sense to enumerate each of the types of laws or regulations (along with the political bodies enacting them) that a motor carrier might opt to make applicable to it. In the absence of this clarification, the reader could easily infer that motor carriers were permitted to make this choice solely on a State-by-State basis, not on a city-by-city basis. That consideration alone explains why Congress would enumerate "political subdivisions" in subsection (c)(3)(A) and why it would not do so in the safety exception, which was designed to preserve the power of States, not motor carriers. *See Martin v. Hadix*, 527 U.S. 343, 356-57 (1999) (a negative inference does not apply where two statutory sections address different issues and have different overarching goals).

In the final analysis, the differences between the provision preserving the "safety regulatory authority of a State" and the provisions mentioning "political subdivisions" make *Russello*

inapplicable. The provisions are not only dissimilar in structure and history but also in purpose. *See Mortier*, 501 U.S. at 612 ("The scattered mention of political subdivisions elsewhere in [the statute] does not require their exclusion here.").

3. The Court Of Appeals' Application Of *Russello* Creates More Interpretive Problems Than It Solves.

Just as the *Russello* inference does not apply where alternative explanations exist for including words in one part of a statute but not in another, it also does not apply where the inference leads to an "odd" interpretation to which "common sense would balk." *Field*, 516 U.S. at 67-68; *see also Mortier*, 501 U.S. at 608 (declining to adopt narrow interpretation of "State" premised on the treatment of political subdivisions elsewhere in the statute because of the "anomalous result" that would occur). That limitation on *Russello* also applies here.

a. The Decision Below Undermines The *Enforcement* Of All Safety Laws.

Application of *Russello* here leads to several "common sense" problems. As an initial matter, it would dramatically undermine the *enforcement* of all *state* safety laws. The preemption provision, recall, specifies that no State or subdivision may "enact or *enforce*" any towing laws. *See* 49 U.S.C. § 14501(c)(1) (emphasis added). If, as the Sixth Circuit held, the safety exception reinstates only the *State's* authority to "enact" and "*enforce*" safety laws (and preempts any delegation of that authority to local governments), state safety laws could never be enforced by cities. That would mean only state troopers, but not city or county police officers, could issue tickets or make arrests for a violation of the State's towing and other intrastate motor vehicle laws. This would come as a great surprise to the States, as most law-enforcement authority (including authority to enforce state laws) is exercised by county and city police officials and, in

the end, would lead to the practical unenforceability of the very safety regulations that the statute explicitly excepted from federal preemption. That of course is not what Congress had in mind—particularly since it elsewhere affirmatively stated that its intention was "to promote *safe* . . . transportation." 49 U.S.C. § 13101(a)(1)(B) (emphasis added).

b. The Decision Below Undermines Local Size, Weight And Hazardous-Materials Route Regulations.

The lower court's narrow reading of "regulatory authority of a State" also undercuts other state powers specifically and historically preserved from preemption. Section 14501(c)(2)(A) not only makes an exception for "the safety regulatory authority of a State" but also saves "the authority of a *State* to impose highway *route* controls or limitations based on the *size* or *weight* of the motor vehicle or the *hazardous nature* of the cargo." *Id.* (emphasis added). Assuming that the phrase "authority of a State" means the same thing throughout the sentence that makes up § 14501(c)(2)(A), *see Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000), it would follow that the provision saves only a State's, but not a city's, ability to enact size, weight, and hazardous-material route restrictions on motor vehicles.

This reading of the provision would have a distorting effect on traditional law-enforcement practices in this area as well. To our knowledge, *every* local government in the country purports to limit the size and weight of trucks and cars that may enter city or state highways or pass on bridges, and many cities regulate the hazardous cargo that may be carried on their roads. *See, e.g.*, Arlington, Va., County Code of Ord. §§ 14.2-53(e), 14.2-57; Tucson, Ariz., Code § 13-15; Houston, Tex., Code § 45-58; Fort Wayne, Ind., Code ch. 75.02; N.Y., N.Y., Rules & Reg. § 4-15(h); Concord, N.H., Code art. 5-3-2; Des Moines, Iowa, Code § 114-460.03; Fremont, Cal., Code § 3-

2707; Knoxville, Tenn., Code § 17-419; Manhattan, Kan., Code § 31-1; Scottsdale, Ariz., Code § 17-61.

Yet no other exception in § 14501(c)(2) allows these classically-local restrictions. Only a state legislature willing to examine every street in every municipality, then to enact routing rules appropriate to each, would be able to restrict the routes of motor carriers on these bases. And that of course would solve only the "enact[ment]" problem. "Enforc[ing]" these laws, as shown above, would present still another challenge—ultimately requiring hapless state troopers to take control of enforcing each of these quintessentially local laws.

Nor is this risk a contrived one. A federal district court recently reached this exact conclusion. *See Cal. Dump Truck Owners Ass'n v. Davis*, 172 F. Supp. 2d 1298, 1303-04 (E.D. Cal. 2001). Applying the same logic as the court of appeals in this case, the court reasoned that § 14501(c)(2)(A) preserves only a *State*'s ability to impose restrictions on motor carriers, then held all state statutes purporting to delegate this authority preempted and ultimately invalidated *all* local traffic-control laws as applied to intrastate motor carriers. *Id.* Under this reasoning, which follows the trajectory of the lower court's analysis in this case, even municipal one-way-street laws would be preempted.

In the end, no legislature intent on preserving the "safety regulatory authority of a State" would erect such an administratively awkward and ultimately counter-productive regime. And the National Legislature deserves more credit than to have compelled it.

c. The Decision Below Undermines The Federal Government's Own Assessment Of The Cooperative Federal, State And Local Authority That Exists In This Area.

Several other indicators of statutory meaning make the *Russello* principle inapplicable. **First**, the lower court's state-

law-only reading of the safety exception cannot be squared with the statutory findings that Congress made in enacting the law in 1994. In pertinent part, they provide:

> (a) FINDINGS.—Congress finds and declares that—
>
> (1) The *regulation of intrastate transportation of property by the States* has—
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> ***
>
> (2) certain aspects of the *State regulatory process* should be preempted.

FAAA Act, Pub. L. No. 103-305, § 601(a), 108 Stat. 1569, 1605 (1994) (emphasis added). As Congress demonstrated in making these statutory findings, a federal effort to place limitations on the "States" and "the State regulatory process" generally covers the activities of all state-created entities, not just state legislatures. Under the court of appeals' application of *Russello*, however, the purpose of the 1994 legislation was only to address intrastate laws enacted by States in this area, not those promulgated by cities. Yet no court to our knowledge has ever embraced that view.

Second, the lower court's interpretation is at odds with DOT's extant power to review state *and* local safety laws. For some time, Congress has vested DOT with authority to review state and local safety laws affecting interstate and intrastate commerce. *See, e.g.*, 49 U.S.C. §§ 31104(h), 31136, 31141, 49 C.F.R. §§ 350.335, 355. Under these provisions, DOT has broad powers to preempt and approve state *and* local safety laws that are incompatible with other federal laws. Needless to say, it would be a strange statutory regime that gave DOT power to review a type of local power (*e.g.*, city ordinances) that could not be exercised in the first instance. *See Mortier*, 501 U.S. at 608-09.

Third, when it comes to local regulation of hazardous materials, the decision below again is inconsistent with Congress's and DOT's own understandings. In other parts of Title 49, Congress has indicated that the "authority of a State" with respect to hazardous materials includes the State's discretion to delegate its authority to political subdivisions. *See* 49 U.S.C. §§ 5112(a)(2) (reserving to "each State" certain authority to establish highway routing controls or limitations for hazardous materials); *id.* § 5112(b)(1)(H) (contemplating State delegation of that authority by mandating regulations that require each State to ensure "*political subdivisions of the State* comply with standards prescribed under this subsection in establishing . . a highway routing designation . . .") (emphasis added).

DOT has a similar view. Several of its regulations intimate (and in some instances explicitly state) that local ordinances are permitted when it comes to the transportation of hazardous materials. *See, e.g.*, 49 C.F.R. § 397.3 (requiring every motor vehicle containing hazardous materials to be driven "in compliance with the laws, *ordinances*, and regulations of the jurisdiction in which it is being operated" unless they are at variance with a specific and more stringent federal regulation); *id.* § 397.69 ("[A]ny highway routing designation affecting the highway transportation of NRHM [non-radioactive hazardous material], *made by a political subdivision of a State is considered as one made by that State* . . . .") (emphasis added); *id.* § 397.71 ("If a State or any political subdivision thereof, . . . chooses to establish, maintain, or enforce any NRHM routing designation, the Governor . . . shall designate a routing agency for the State . . . [to] ensure that all NRHM routing designations within its jurisdiction comply with the Federal standards in this section."). *Accord* Fed. Motor Carrier Safety Admin., Dep't of Transp., *Cleveland, Ohio Requirements for Transportation of Hazardous Materials*, 66 Fed. Reg. 29,867, 29,871 (June 1, 2001) (ruling that a Cleveland, Ohio hazardous-materials ordinance restricting access to the

downtown area during the busiest times of the work week was not preempted by federal hazardous material transportation law except with respect to certain materials used by hospitals).

Fourth, DOT has issued an interpretive guideline regarding the application of §14501 to tow trucks that is inconsistent with the lower court's decision. Entitled *Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994, P.L. 103-305*, the pamphlet contains a section that addresses "Tow Truck Operations" and that assumes Congress meant to permit local safety regulations. It says that "State actions that are legitimately grounded in public safety considerations are exempt from Title VI. For example, we believe that State *or local* regulations governing the towing of damaged or abandoned vehicles that are public safety hazards would fall within this exemption." Br. App. at E-5 (emphasis added). In addition, DOT has issued an interpretive notice, which provides that under § 14501(c)(2)(A) "State *and local governments* are able to regulate freight forwarders of property with respect to motor vehicle *safety*, financial responsibility, and other State standard transportation practices." Fed. Highway Admin., Dep't of Transp., *General Jurisdiction Over Freight Forwarder Service*, 62 Fed. Reg. 4096, 4099 (Jan. 28, 1997) (emphasis added). These agency interpretations of § 14501(c)(2)(A) are consistent and reasonable and therefore "merit some deference." *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2175 (2001). *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In the final analysis, the City of Columbus's reading of the statute respects not only the terms and general structure of § 14501 but also Congress's and DOT's own understanding of what those provisions mean. That consistent understanding should be followed here.

B. The Deregulatory Function Of The Statute Is Not Advanced By The Court Of Appeals' Decision.

Neither does the deregulatory objective of the statute support the decision of the court of appeals. In its view, "one of the means by which Congress intended to encourage market forces was through the elimination of a myriad of complicated and potentially conflicting state regulations, thus indicating that yet another level of regulation at the local level would be disfavored." *Petrey*, 246 F.3d at 563; Pet. App. 28-A. Yet even this highly-generalized objective is not necessarily advanced by the lower court's interpretation.

Far from ensuring that "another level of regulation" would be eliminated, the lower court's interpretation in one respect does just the opposite. If, as the court of appeals held, Congress's failure to reference a "political subdivision of a State" in subsection (c)(2)(A) means that such bodies may not pass towing safety regulations, it follows that Congress's failure to name the "political authority of 2 or more States" in the safety exception means that States may not aggregate their power to create regional safety rules for their streets and byways. That interpretation of the exception, however, cannot co-exist with the deregulatory objective that supposedly animated it. A prohibition that bars States from aggregating their "safety regulatory authority" ultimately would expand, rather than limit, the potential number of motor carrier safety regulations.

C. The Legislative History Does Not Advance The Court Of Appeals' Analysis.

The court of appeals also believed that the legislative history supports its reading of the statute. Pet. App. 28-A. That, too, is wrong.

In reaching this conclusion, the court of appeals quoted the following statement from the Conference Report:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. *State economic regulation* of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets . . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers.

Petrey, 246 F.3d at 563 (quoting H.R. Conf. Rep. No. 103-677, at 87 (emphasis added)). This statement simply does not bear the weight the court placed on it.

The quoted language, to begin with, conspicuously uses "State economic regulation" to refer to State *and* city regulations. Indeed, throughout the Conference Report, "State" is used in this fashion. *See* H.R. Conf. Rep. No. 103-677 at 83-88. That nomenclature of course advances rather than undercuts the City's position.

In addition, this passage says nothing about local safety regulations. It says only that § 14501(c) was intended to eliminate complex "economic regulations," and Congress was careful in the paragraphs proceeding it to distinguish *economic* regulations from *safety* laws: the former were preempted while the latter were not. *See id.* at 83-85. With respect to safety laws, the Report states that they would not be preempted because § 14501(c)(2)(A) left safety regulatory authority "unaffected" and "unchanged" and allowed governments to "continue to exercise" their safety regulatory authority. *Id.* at 84, 85 Consistent with maintaining the *status quo* in this area, the Conference Report provides that the safety exception was intended to describe the *kind* of existing laws that were excepted from preemption, not the political entities allowed to pass these laws. *See id.* at 84-85. It thus characterizes § 14501(c)(2) as specifying "some of the matters" that are excepted from preemption and stresses that its purpose is to describe "those areas" that are excepted from

preemption, not to limit the States' traditional methods of regulating the area. *Id.* at 84.

Beyond these affirmative statements, the cited Conference Report is perhaps most notable for its silence. It contains *no* statement suggesting that Congress intended to alter the traditional role of municipalities in the regulation of motor vehicle safety. Nowhere in the FAAA Act's history does any committee, senator or representative even casually suggest a desire to circumscribe the traditional power of state governments to delegate safety authority. Since such a change would have represented a dramatic departure from existing practice (and over a matter of "intrastate" transportation at that), the failure to mention the topic suggests that Congress had no such purpose in mind. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489-90 (1985).

III. THE SAFETY EXCEPTION SHOULD BE READ TO PRESERVE RATHER THAN TO ALTER THE BALANCE BETWEEN THE FEDERAL GOVERNMENT AND THE STATES.

One other point deserves comment. This is not an ordinary statutory-interpretation case and the court of appeals' decision has led to anything but an ordinary result. It is one thing for Congress to exercise its powers in a given *substantive* area, then to preempt all contrary state laws. But it is quite another to permit state regulation of a given substantive area, then to dictate the state *processes* for legislating there. The Supremacy Clause generally permits the former exercise of federal power, while the Tenth Amendment generally proscribes the latter. *See New York v. United States*, 505 U.S. 144, 178 (1992) ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation."); *Printz v.*

United States, 521 U.S. 898, 924 (1997) ("Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.") (internal quotations and citations omitted).

As interpreted by the court of appeals, § 14501 has been transformed from a run-of-the-mill law about the subject-matter scope of federal preemption into an entangling directive about the branches of state government allowed to do their job. That is not the way Congress typically legislates, and still less does it do so when regulating an "intrastate" activity. From the perspective of the States, it would be no less strange had Congress told the States where their legislatures must meet, dictated whether their legislatures should be bicameral or unicameral, or limited the authority of executive-branch agencies to implement state laws. The Court historically has resisted interpretations of federal law that make incursions on such state prerogatives—in the absence of unequivocal direction from the National Legislature. It should do the same here.

A. The Clear-Statement Doctrine Applies Here.

Rooted in Federal-State comity, constitutional avoidance and constitutional imperative, the clear-statement rule has been invoked in a wide range of settings affecting core areas of state government. The Court has applied the rule in construing federal statutes to regulate private individuals, but not States. *See, e.g., Employees of the Dep't of Pub. Health & Welfare v. Mo. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). It has applied the rule in deciding whether federal law exposes the States to money-damages actions. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). And it has applied the rule in determining whether Congress meant to regulate the qualifications of high-

ranking state officials. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Throughout, the Court has offered two basic explanations for this presumption against federal regulation of core state functions. The rule first ensures "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved" in the interpretation of the statute. *United States v. Bass*, 404 U.S. 336, 349 (1971). That requirement follows from the explanation for allowing Congress to regulate core state functions at all. Under *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Constitution permits Congress to regulate the States only because they are presumed to be able and willing to protect their self-interest through their representatives in Congress. But "[t]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 501 U.S. at 464 (citing L. Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988)).

The rule also serves constitutional-avoidance objectives by precluding premature resolutions of knotty constitutional questions. "[O]ut of respect for Congress," the Court "assume[s]" that Congress "legislates in the light of constitutional limitations" and would not wish to trigger judicial debates about the relative powers of the States and the Federal Government—until Congress first has considered the question, then expressly passed a law compelling the Third Branch to agree or disagree with its assertion of authority. *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (quotation omitted); *see also INS v. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2279 (2001); *Gregory*, 501 U.S. at 464.

Doubtless this rule and each of its functions apply here. The Court has repeatedly acknowledged that States have great discretion, if not absolute discretion, over how they distribute and allocate governmental power. *See Hunter*, 207 U.S. at

178-79. And the Court has long recognized the extraordinarily wide latitude that States have to create local governments and delegate powers to them. *See Sailors v. Bd. of Educ.*, 387 U.S. 105, 107-08 (1967). Indeed, the power of a State to organize itself is "a decision of *the most fundamental sort* for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State *defines itself* as a sovereign." *Gregory*, 501 U.S. at 460 (emphasis added). This foundational authority parallels the uncontested power of a State to vest a city with the attributes and power of a state capitol. *See Coyle v. Smith*, 221 U.S. 559 (1911). And just as the Tenth Amendment prevents Congress from limiting a State's discretion to name a capitol city, *see id.* at 574-75, it also generally bars Congress from telling a State how to organize and distribute its police powers. *See Gregory*, 501 U.S. at 460; *Sailors*, 387 U.S. at 107-08. If the clear-statement requirement does not apply in the face of these constitutional imperatives, it is not clear where it would apply.

B. Congress Has Not Satisfied The Clear-Statement Requirement Here.

Whether stated as an "unmistakably clear" requirement, *Gregory*, 501 U.S. at 460-61 (quotation omitted), as an "unequivocal and textual" requirement, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), or merely as a "clear statement" rule, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotation omitted), the point is the same: Congress must leave no doubt about its intentions to regulate core state functions. In this instance, Congress did no such thing.

In preserving the "safety regulatory authority of a State" with respect to intrastate transportation, Congress did not expressly prohibit States from delegating that authority to local subdivisions. The exception says nothing *at all* about local governments or delegations of authority. And it fails to name *any* actor that is allowed to exercise regulatory authority.

Instead, it preserves a *kind* of authority and leaves open the question of who may exercise it. This ambiguity alone precludes the reading of the safety exception adopted by the court of appeals, and no amount of inferences from statutory silence may overcome this presumption. So long as a law is "susceptible of" an interpretation that does not infringe an historically-respected state prerogative—which assuredly is the case here—that is enough to defeat an alternative reading of the law. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). *See also Gregory*, 501 U.S. at 467; *cf. Mortier*, 501 U.S. at 607-08 ("The exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of [this] very entity. . . . [the more plausible reading of States is thus that it] leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities."). On this basis alone, the lower court's decision should be reversed.

CONCLUSION

The court of appeals' decision should be reversed.

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APPENDIX A

FULL TEXT OF 49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

(a) Motor carriers of passengers.—

(1) Limitation on State law.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to—

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

(2) Matters not covered.—Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(b) Freight forwarders and brokers.—

(1) General rule.—Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) Continuation of Hawaii's authority.—Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) Motor carriers of property.—

(1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.—Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.—

(A) Continuation.—Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to—

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.—A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if—

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a

provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election.—Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii.—This subsection shall not apply with respect to the State of Hawaii.

APPENDIX B

HISTORY OF 49 U.S.C. § 14501's TEXT

I. THE PRE-AMENDED VERSION OF 49 U.S.C. § 11501.

The current version of 49 U.S.C. § 14501 has its origins in 49 U.S.C. § 11501. In 1991, before any of the provisions at issue here were passed, § 11501 read as follows:

§ 11501. Interstate Commerce Commission authority over intrastate transportation.

(a) The Interstate Commerce Commission shall prescribe the rate, classification, rule, or practice for transportation or service provided by a household goods freight forwarder subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title when the Commission finds that a rate, classification, rule, or practice of a State causes--

(1) between persons or localities in intrastate commerce and in interstate and foreign commerce, unreasonable discrimination against those persons or localities in interstate or foreign commerce; or

(2) unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this

subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to

be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(5)(A) Certification of a State authority under this subsection is valid for the 5-year period beginning on the date of such certification. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

(d)(1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when--

(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and

(B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe the intrastate rate under the standards of subsection (a) of this section and chapter 107 of this title. Notice of the application shall be served on the State authority.

(e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title--

(A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and

(B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that--

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in

one State imposes an unreasonable burden on interstate commerce if the Commission finds--

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action

on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission under subsection (e)(3)(B) of this section. Action of the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.

(g) Preemption of State regulation of freight forwarders.--

(1) General rule.--Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to interstate rates, interstate routes, or interstate services of any freight forwarder.

(2) Continuation of Hawaii's authority.--Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

II. THE 1994 ADDITION OF THE PREEMPTION PROVISION AND THE SAFETY EXCEPTION UNDER THE FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT ("FAAA ACT").

A. Transportation By Motor Carriers.

In 1994, the FAAA Act, Pub. L. No. 103-305, 108 Stat. 1569 (1994), amended 49 U.S.C. § 11501 to add, as subsection (h), the preemption provision and safety exception at issue here. The then-new subsection (h) read as follows:

(h) Preemption of State economic regulation of motor carriers.--

(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.

(2) Matters not covered.--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(B) does not apply to the transportation of household goods.

(3) State standard transportation practices.--

(A) Continuation.--Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to--

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules, or

(iv) antitrust immunity for joint line rates or routes, classifications and mileage guides,

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.--A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if--

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this subtitle or a regulation issued by the Interstate Commerce Commission or the Secretary of Transportation under this subtitle; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election.--Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

B. Transportation By Air Carriers Or Carrier Affiliated With A Direct Air Carrier.

The FAAA Act also amended the Airline Deregulation Act, specifically 49 U.S.C. § 41713(b), to add a nearly identical preemption provision and safety exception for air carriers and carriers affiliated with direct air carriers:

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.----

(A) General rule.--Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by

aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.--Subparagraph (A)--

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 10102 of this title.

III. THE 1995 RENUMBERING OF § 11501 AND THE ADDITION OF THE NON-CONSENSUAL TOW EXCEPTION UNDER THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT ("ICCTA").

In 1995, Congress passed the ICCTA, *see* Pub. L. 104-88, 109 Stat. 803 (1995). As is relevant here, the ICCTA renumbered portions of 49 U.S.C. § 11501, including the preemption provision and safety exception, and added a non-consensual towing exception to preemption. After it was revised, 49 U.S.C. § 14051 read as follows:

§ 14501. Federal authority over intrastate transportation

(a) Motor Carriers of Passengers.--No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this

title on an interstate route or relating to the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This subsection shall not Apply to intrastate commuter bus operations.

(b) Freight Forwarders and Brokers. --

(1) General Rule.--Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) Continuation of Hawaii's Authority. --Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) Motor Carriers of Property.--

(1) General Rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters Not Covered.--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size

or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not Apply to the transportation of household goods; and

(C) does not Apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State Standard Transportation Practices. --

(A) Continuation.--Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to--

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements.--A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if--

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only Applies to a carrier upon request of such carrier.

(C) Election.--Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii.--This subsection shall not Apply with respect to the State of Hawaii.

IV. THE ADDITION OF A SAFETY EXCEPTION TO MOTOR CARRIERS OF PASSENGERS IN 1998.

The final amendments to § 14501 occurred in 1998. Under the Transportation Equity Act of 1998, Pub. L. 105-178, 112 Stat. 107 (1998), Congress made revisions to the organization of § 14501(a) and added a safety exception to it. In addition, Congress subsequently made a minor change to the provision to clarify the preservation of Hawaii's laws regarding intrastate bus transportation. In light of these amendments, § 14501(a) now reads:

(a) Motor carriers of passengers.--

(1) Limitation on State law.--No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to--

(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route;

(B) the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required; or

(C) the authority to provide intrastate or interstate charter bus transportation.

This paragraph shall not apply to intrastate commuter bus operations, or to intrastate bus transportation of any nature in the State of Hawaii.

(2) Matters not covered.--Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

APPENDIX C

STATE DELEGATIONS OF POWER TO MUNICIPALITIES

ALA. CODE § 11-45-1 (1975)
ALASKA CONST. art. X, § 11
ARIZ. CONST. art. XIII, § 2
ARK. CODE ANN. § 14-55-102 (1987)
CAL. CONST. ART XI, § 7
COLO. CONST. ART. XX, § 6
CONN. GEN. STAT. ANN. § 7-148 (WEST 2001)
DEL. CODE. ANN. TIT. 22, § 802 (2000)
FLA. CONST. ART. VIII, § 2
GA. CODE ANN. 36-34-1
HAW. CONST. ART. VIII, § 2
IDAHO CONST. ART. XII, § 2
65 ILL. COMP. STAT. ANN. 5/11-1-1 (WEST 2001)
IND. CODE § 36-1-3-2 (1997)
IOWA CONST. ART. III, § 38A
KAN. CONST. ART. 12, §5
KY. REV. STAT. ANN. § 82.082 (BANKS-BALDWIN 2001)
LA. CONST. ART. 6, § 5
ME. CONST. ART. VIII, PART 2, § 1
MD. CONST. ART. XI-E, § 3
MASS. CONST. ART. II, § 6
MICH. CONST. ART. VII, § 21
MINN. STAT. § 410.04 (2000)
MINN. STAT. § 410.19 (2000)
MISS. CODE ANN. § 21-17-5 (2001)
MO. CONST. ART. 6, § 19
MONT. CONST. ART. XI, § 6
NEB. CONST. ART. XI, §§ 2-4
NEV. REV. STAT. ANN. 266.010 (2001)
N.H. REV. STAT. ANN. § 31.39
N.J. STAT. ANN. § 40:69A-30 (2001)
N.M. CONST. ART. X, § 6

N.Y. CONST. ART. IX, § 2
N.C. CONST. ART. VII, §1
N.D. CONST. ART. 7, § 1
OHIO CONST. ART. XVIII, § 3
OKLA. CONST. ART. XVIII, § 3A
OR. CONST. ART XI, § 2
PA. CONST. ART. 9, § 2
R.I. CONST. ART. XIII, § 2
S.C. CONST. ART. VIII, § 17
S.D. CONST. ART. IX, § 2
TENN. CONST. ART. XI, § 9
TEX. CONST. ART. XI, § 5
UTAH CONST. ART. XI, § 5
VT. STAT. ANN. TIT. 24, § 2291 (1999)
VA. CODE ANN. § 15.2-1102 (1997)
WASH. CONST. ART. XI, § 11
W. VA. CONST. ART. VI, § 39
WISC. CONST. ART. XI, § 3
WYO. CONST. ART. 13, § 1

APPENDIX D

MUNICIPAL TOWING REGULATIONS IN ORDER OF CITY SIZE

NEW YORK, N.Y., ADMIN. CODE §§ 20-495–20-498, 20-504–20-528

L.A. COUNTY, CAL., CODE § 7.28.020

CHICAGO, ILL., MUN. CODE §§ 9-44-010–9-44-060

D.C., MUN. REG. §§ 16-401–16-409

BALTIMORE, MD., COUNTY CODE §§ 24-226–24-230

SAN FRANCISCO, CAL., POLICE CODE §§ 3000–3013

PHILA., PA., CITY CODE § 9-605

DETROIT, MICH., CITY CODE §§ 55-1-10–55-1-17

DALLAS, TEX., CITY CODE § 48A

HOUSTON, TEX., CODE §§ 8-124–8-129, 8-134, 8-143–8-153, 8-161–8-168, 8-177–8-179, 8-181–8-190, 8-210–8-216

ATLANTA, GA., CITY CODE §§ 162-221–162-234

MIAMI, FLA., CITY CODE §§ 42-103–42-111

SEATTLE, WASH., MUN. CODE §§ 6.214.040–6.214.070

PHOENIX, ARIZ., CODE §§ 36-6–36-8

MINNEAPOLIS, MINN., CODE OF ORD. §§ 349.10–349.100

ST. LOUIS COUNTY, MO., REVENUE ORD. §§ 813.070–813.080

DENVER, COLO., REV. MUN. CODE § 55-179–55-193

PITTSBURGH, PA., CODE §§ 523.02–523.07, 525

TAMPA, FLA., CODE OF ORD. §§ 6-230–6-234, 14-48

PORTLAND, OR., CODE § 14.36.040

CINCINNATI, OHIO, MUN. CODE § 869-7

KANSAS CITY, MO., CODE OF ORD. § 70-399, 70-908, 76-281–76-288

SACRAMENTO, CAL., CODE §§ 5.144.010–5.144.090

MILWAUKEE, WIS., COUNTY CODE APP. C § 23

SAN ANTONIO, TEX., CODE § 19-391

INDIANAPOLIS, IND., CODE §§ 611-206–611-214

LAS VEGAS, NEV., PARKING CODE § 11.55.080

SAN JOSE, CAL., MUN. CODE § 6.66

SANTA ANA, CAL., MUN. CODE §§ 32-81–32-107

MYRTLE BEACH, FLA., CITY CODE § 23-133

APPENDIX E

DEPARTMENT OF TRANSPORTATION
INTERPRETIVE GUIDELINE AND COVER LETTER

U.S. Department of Transportation
Office of the Secretary of Transportation

400 Seventh St. S.W.
Washington, D.C. 20680

GENERAL COUNSEL

March 9, 1995

Mr. Larry Cernosek
Chairman
Texas Towing and Storage Association
2104 Lyons Ave.
Houston, Texas 77020

Dear Mr. Cernosek:

Thank you for your letter requesting opinions on several questions relating to the legality of tow truck regulations in Texas. Your letter, which was addressed to Assistant Secretary Frank E. Kreusi, was referred to me for reply.

The Department of Transportation (DOT) has received many inquiries on the interpretation and effect of the preemption provisions of Title VI of the Federal Aviation Administration Authorization Act of 1994, as has the Interstate Commerce Commission (ICC). Unfortunately, because of the limited resources we have, we are not in position to address every such inquiry individually.

However, we have prepared some materials that summarize and interpret key portions of the Act. We are enclosing a copy, which was developed through a coordinated process involving counsel's offices at DOT, the ICC, and the Federal Highway Administration.

Thank you for bringing these issues to our attention, and I hope that this information will be of assistance to you.

Sincerely,

____/s/_____

Stephen H. Kaplan

General Counsel

Enclosure

U.S. DEPARTMENT OF TRANSPORTATION

INTRASTATE TRUCKING DEREGULATION:
AN ANALYSIS AND INTERPRETATION OF TITLE VI, FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT OF 1994, P.L. 103-305

Summary of Title VI: Title VI preempts most State and local regulation of the prices, routes, and services of intrastate motor carriers of property. It became effective January 1, 1995, except in Hawaii.

Statutory Exemptions: The statute expressly exempts regulation regarding the transportation of household goods. It also expressly exempts regulation by States respecting (1) motor vehicle safety; (2) route controls or limitations based on vehicle sizes and weights or hazardous cargo; and (3) insurance requirements. Certain other provisions relating to uniform cargo liability, bills of lading, or cargo credit rules, or antitrust immunity for joint line rates or routes, classifications and mileage guides, may be imposed upon carriers so long as they consent and the provision covers the same subject matter as, and is no more burdensome than, certain statutory provisions or ICC or DOT regulations.

Constitutionality: Constitutional challenges to Title VI, based on Tenth Amendment and Commerce Clause claims, were rejected by United States District Courts in both Oklahoma and West Virginia. An appeal of the Oklahoma decision is pending in the United States Court of Appeals for the Tenth Circuit, and the merits of another complaint have yet to be heard in a United States District Court in Illinois.

Enforcement: The Department of Transportation and the Attorney General are authorized to enforce the preemption provisions of subsection 601(b) of Title VI, relating to transportation by air carrier or carrier affiliated with a direct air carrier, by virtue of the FAAA Act's placement of that subsection in the air commerce and safety part of Title 49,

United States Code. Subsection 601(c), which deals with other motor carriers, amends a provision of the Interstate Commerce Act, over which DOT does not exercise enforcement authority. As a practical matter, we anticipate that resolution of conflicts will occur at a the local level, with judicial relief being provided where necessary through requests for judicial relief being provided where necessary through requests for declaratory judgments, suits for injunctive relief, defenses to State and local enforcement actions, etc.

Contract Services: Title VI does not restrict States and localities from contracting with motor carriers to provide services to them, much as they might contract for any other services. See, e.g., American Airlines v. Wolens, No. 93-1286 (Jan. 18, 1995), in which the United States Supreme Court held that the preemption language of the Airline Deregulation Act (upon which Title VI was largely based) allows room for court enforcement of "frequent flyer" contract terms set by the parties themselves. State or local towing contracts may of course contain specifics on services, routing, and prices. However, if such contracts have the practical effect of restricting entry into the marketplace or limiting operations, based on demonstrations of public convenience and necessity or other considerations not grounded in legitimate safety or insurance regulation, they will likely run afoul of the new law. Where contested matters arise in this area, we expect that scrutiny will be given to whether the State or locality has acted as a customer in such arrangements, or effectively as a regulator.

Garbage and Curbside Household Recyclables: Title VI governs motor carriers of *property*. The ICC has never regulated collection of garbage and curbside household recyclables, holding that they are not considered property. We thus do not regard Title VI as applying to pickups of trash and recyclables at the curbside. (However, the transportation of recyclables in commercially valuable quantities, such as a

movement of metal scrap to or from a foundry, is likely subject to Title VI.)

Tow Truck Operations Tow truck operators are considered to be motor carriers of property under the Interstate Commerce Act and are, under some circumstances, subject to ICC jurisdiction. See 49 USC 10526(b)(3). States and localities, as noted above, may freely contract as customers for services to be supplied by particular tow truck operators, but scrutiny would be given to contracts that appear to be a guise for economic regulation. We also note that State actions that are legitimately grounded in public safety considerations are exempt from Title VI. For example, we believe that State or local regulations governing the towing of damaged or abandoned vehicles that are public safety hazards would fall within this exemption, assuming again that such regulations are not a guise for broader economic restrictions. [We note in this regard that bills have been introduced in the Congress, S. 302 and H.R. 866, which would specifically exempt State regulations relating to the towing of a motor vehicle performed at the request of a law enforcement officer or without the prior consent or authorization of the owner or operator of the vehicle. The Department has no position on these bills at this time.]

March, 1995